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No.

IN THE

# Supreme Court of the United States

VICTOR H. MORENO, III, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED; ANA LAURA MORENO, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED, PETITIONERS

*v.*

SUMMIT MORTGAGE CORPORATION; FIRST NATIONWIDE MORTGAGE CORPORATION

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Is the pre-arranged and largely completed sale of a residential mortgage a "bona fide transfer of a loan obligation in the secondary market" and thus exempt from the requirements of the Real Estate Settlement Practices Act?

## PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 29.6, petitioners state that they have no parent companies or nonwholly owned subsidiaries.

## TABLE OF CONTENTS

*Page*

QUESTION PRESENTED ..... i

PARTIES TO THE PROCEEDING ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... iv

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

RELEVANT PROVISIONS ..... 1

STATEMENT ..... 1

REASONS FOR GRANTING THE WRIT ..... 6

CONCLUSION ..... 14

APPENDIX

CIRCUIT COURT DECISION ..... 1a

DISTRICT COURT DECISION ..... 9a

DISTRICT COURT ORDER ..... 25a

RELEVANT PROVISIONS ..... 27a

## TABLE OF AUTHORITIES

*Page*

**CASES**

CHANDLER V. NORWEST BANK MINN., N.A. 137 F. 3D 1053 (8TH CIR. 1998) ..... 6, 16

CULPEPPER V. INLAND MORTGAGE CORP., 132 F.3D 692 (11TH CIR. 1998) ..... 10

LAMIE V. UNITED STATES TRUSTEE, __U.S. __ , 124 S.CT. 1023 (2004) ..... 7

**STATUTES**

12 U.S.C. § 2601(a) ..... 8

12 U.S.C. § 2601(b)(2) ..... 8

12 U.S.C. § 2602(3) ..... 8

12 U.S.C. § 2605 ..... 9

12 U.S.C. § 2607(a) ..... 8

12 U.S.C. § 2607(c) ..... 9

28 U.S.C. § 1254(1) ..... 1

**OTHER AUTHORITIES**

24 C.F.R. § 3500.2(b) ..... 8, 10

24 C.F.R. § 3500.5 ..... 13, 16

24 C.F.R. § 3500.5(a) ..... 9

25 C.F.R. § 3500.5(b)(7) ..... 9

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-8a) is reported at 364 F.3d 574. The opinion of the district court (App., *infra*, 10a-26a) is unreported.

## JURISDICTION

The court of appeals' judgment was entered on March 23, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## RELEVANT PROVISIONS

Relevant provisions are listed at the end of the appendix.

## STATEMENT

This case raises important issues regarding mortgage industry practices that artificially inflate residential mortgages in this country despite Congress' efforts since 1974 to eliminate them. In affirming the summary judgment entered in favor of Respondents, the Fifth Circuit Court of Appeals concluded that the Real Estate Settlement Practices Act ["RESPA"] did not apply to the transaction at issue, based on its misinterpretation of regulations that, if allowed to remain uncorrected, eviscerates Congress' clearly stated intent in passing RESPA. Because the issues are on-going and involve households throughout the United States, this Court should use this opportunity to affirm Congress' intent – consumers will no longer be subjected to inflated mortgages resulting from undisclosed referral fees.

## A. The transaction at issue.

The facts surrounding the transaction at issue are critical to determining the applicability of RESPA, which, as explained below, hinges on whether the transaction constitutes a bona fide sale of a loan in the secondary market. Consequently, although the opinions of the lower courts accurately set forth most of the relevant facts, some discussion is necessary to provide the Court with a complete understanding of the Morenos' argument.

It is undisputed that the Morenos obtained a mortgage from Summit Mortgage and that the mortgage was transferred to First Nationwide via a pre-arranged sale. In order to understand the nature of that transaction, and the Morenos' assertion as to its illegality, Summit Mortgage's business relationship with First Nationwide is set forth below. A discussion of the Morenos' transaction then follows.

### 1. Summit Mortgage's Relationship With First Nationwide.

Summit Mortgage's business is to originate residential mortgage loans. (App. 2a) In so doing, it accepts mortgage applications from potential borrowers, performs or arranges for all work necessary to evaluate and approve the applicants and the security for the loan, and, for approved applications, produces the necessary documentation to properly evidence and perfect the mortgage loan and provides the interim funds for the loan. (App. 2a) For these services, Summit Mortgage receives an origination fee plus other fees applicable to specific services provided during the transaction. First Nationwide, on the other hand, is a mortgage lender.

(App. 3a) Summit Mortgage's and First Nationwide's business relationship and the transaction at issue are governed by three documents: (1) the "Mortgage Loan Purchase and Sale Agreement" between Summit Mortgage and First Nationwide; (2) the contract between Summit Mortgage and Bank United titled, "Warehouse Credit and Security Agreement"; and (3) First Nationwide's "Lender Guide". (App. 15a)

Under the "Mortgage Loan Purchase and Sale Agreement", Summit Mortgage agreed to sell mortgages to First Nationwide that complied with the restrictions outlined in First Nationwide's Lender's Guide. (App. 15a) Under this contract, Summit Mortgage would submit a request to First Nationwide to commit to buy a prospective loan. (App. 15a). Once the price was agreed upon, First Nationwide would execute a "Commitment Confirmation" which bound First Nationwide to buy a specific prospective loan after it was closed by Summit Mortgage. (App. 16a) Under the "Warehouse Credit and Security Agreement", Summit Mortgage borrowed interim funds from Bank United to fund the closing of "Eligible Mortgage Loans". (App. 16a) Only prospective mortgage loans with an executed purchase commitment, or "Commitment Confirmation" from a third party such as First Nationwide, are "Eligible Mortgage Loans" under the warehousing contract. (App. 16a) With these interim funds received through Bank United, Summit Mortgage would fund and close a mortgage loan. (App. 16a) Summit Mortgage would then transfer the mortgage loan to the previously-committed third party mortgage lender such as First Nationwide, and immediately repay Bank United. (App. 16a) Bank United would then deliver the mortgage loan to the purchasing mortgage lender. (App. 15a)

Pursuant to First Nationwide's Lender's Guide, each mortgage submitted to First Nationwide for purchase must meet specific underwriting criteria. (App. 16a) Also pursuant to the Lender's Guide, First Nationwide issued daily price sheets detailing what it would pay for specific loans. (App. 16a) The amount paid was primarily tied to the amount the interest rate of the prospective mortgage loan exceeded First Nationwide's listed par rate. (App. 16a)

**2. The Morenos' Loan**

Summit Mortgage originated the Morenos' mortgage loan. On March 14, 2001, First Nationwide executed and delivered to Summit Mortgage a Commitment Confirmation identifying the Morenos' mortgage. (App. 17a) The rate on the Morenos' mortgage was the highest priced loan for First Nationwide that day. (App. 17a) Upon receipt of First Nationwide's Commitment Confirmation, Summit Mortgage requested interim funds from Bank United to fund the Morenos' mortgage. (App. 17a)

The Morenos' mortgage closed on March 19 or 20, 2001.[1] On March 19, 2001, Summit Mortgage delivered to Bank United a copy of First Nationwide's purchase commitment, establishing that First Nationwide was going to pay for the Morenos' loan once closed, and was purchasing it for an amount above the interim financing cost. (App. 17a) That same day, Summit Mortgage assigned the Morenos' loan to First Nationwide and

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[1] The exact date of the closing is not clear. However, any dispute regarding the closing date is not dispositive of the issues raised herein.

executed an Insurance Endorsement Letter, establishing First Nationwide as the mortgagor on the insurance policy covering the Morenos' residence. (App. 17a) Documents were also signed to ensure that the Morenos sent all tax notices they received to First Nationwide. (App. 17a) Finally, Summit Mortgage assigned the mortgage to First Nationwide that same day. (App. 17a)

Thus, at its closing, the mortgage had already been assigned to First Nationwide, First Nationwide was designated on the insurance policy, and all tax notices were to be sent to First Nationwide. Summit Mortgage had effectively washed its hands of the Morenos' mortgage, for a price determined by nothing more than the extent to which the rate on the mortgage exceeded First Nationwide's best rate.

Following the closing, Summit Mortgage delivered to Bank United the original note, endorsed in blank, a certified copy of the mortgage, a recordable assignment of the mortgage, a copy of the check used to fund the Morenos' loan, and a copy of First Nationwide's purchase commitment. (App. 17a) First Nationwide later transferred the funds for the purchase of the Morenos' mortgage to Summit Mortgage on April 10, 2001. (App. 17a)

**B. <u>The Court of Appeals' Decision.</u>**

The underlying appeal arose from the district court's entry of summary judgment in favor of Summit Mortgage and First Nationwide, which were defendants in the trial court. (App. 9a-26a) In the district court, the Morenos sued Summit Mortgage and First Nationwide, asserting

that they violated RESPA when First Nationwide paid fees to Summit Mortgage for Summit Mortgage's obtaining the Morenos' commitment on a more expensive mortgage than they could have otherwise obtained and then transferring the mortgage to First Nationwide. (App. 10a) The Morenos sought to prosecute their claims as a class action on behalf of other similarly-situated parties. (App. 9a) Summit Mortgage and First Nationwide sought summary judgment, asserting that RESPA did not apply to the transaction at issue. (App. 12a)

On November 15, 2002, the magistrate judge recommended that summary judgment be entered in defendants' favor. (App. 9a-24a) On January 6, 2003, the district court adopted the magistrate judge's recommendation. (App. 25a-26a) The Morenos appealed to the United States Court of Appeals for the Fifth Circuit on January 24, 2003. (App. 2a) On March 23, 2004, the court of appeals affirmed the district court's judgment, concluding that RESPA did not apply because Summit Mortgage's sale of the Morenos' mortgage to First Nationwide was a bona fide secondary market transaction. (App. 1a-8a)

## REASONS FOR GRANTING THE WRIT

The court of appeals failed to give effect to Congress' intent in interpreting Regulation X to exempt the Morenos' loan. In doing so, it stamped judicial approval upon a sham transaction. Moreover, that court's opinion, coupled with the opinion of the Eighth Circuit Court of Appeals in Chandler v. Norwest Bank Min..., N.A. 137 F. 3d 1053 (8th Cir. 1998), provides the home

mortgage industry with a blueprint for constructing transactions so as to avoid RESPA's purview, thereby enabling it to artificially inflate the cost of mortgages through unearned referral fees. As a result, thirty years after Congress passed RESPA for the express purpose of reducing the cost of mortgages by eliminating such unearned fees, home buyers in the United States, such as the Morenos, continue to pay inflated rates when purchasing their homes. This Court should remove that stamp of approval, and put an end to the mortgage industry's abusive practices.

The cardinal rule governing any judicial proceeding involving the applicability of a statute is to give effect to Congress' intent in enacting the legislation. As this Court has explained, that intent is first determined by reference to the statute itself.[2]

In this case, Congress' broad intent underlying RESPA is clearly set forth in the statute. In passing RESPA 1974, Congress expressly provided that its

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[2] As this Court explained recently in *Lamie v. United States Trustee*, __U.S. __, 124 S.Ct. 1023 (2004):

> The starting point in discerning congressional intent is the existing statutory text, (citation omitted), and not the predecessor statutes. It is well established that "when the statute's language is plain, the sole function of the courts — at least where the disposition required by the text is not absurd — is to enforce it according to its terms." (citations omitted). So we begin with the present statute.

*Id.* at 1030.

purpose was to protect home buyers "from unnecessarily high settlement charges caused by certain abusive practices". 12 U.S.C. § 2601(a) [3] To achieve its goal, Congress sought to eliminate "kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. § 2601(b)(2). Toward that end, Congress provided: "No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." 12 U.S.C. § 2607(a).[4]

Congress sought to eliminate abusive practices, not charges relating to the necessary costs of services attendant to the mortgage process. To do so, Congress specifically differentiated the activity it intended to exclude what it deemed appropriate economic activity with regard to mortgage transactions from prohibited activity, explaining that "[n]othing in this section shall be construed as prohibiting ... the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services

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[3] A "settlement" in this context is simply the process of closing a federally related mortgage loan such as the mortgage obtained by the Morenos. 24 C.F.R. § 3500.2(b). A "settlement service" is "any service provided in connection with a prospective or actual settlement." *Id.*

[4] Although the funding and origination of mortgage loans (the services at issue here) were not originally settlement services under RESPA, Congress amended the Act in 1992 to clarify that such activities were covered by the statute. See 12 U.S.C. § 2602(3).

actually performed...". 12 U.S.C. § 2607(c). Thus, under RESPA's clear terms, Congress' broad intent was to lower the cost of mortgages by eliminating fees charged and compensation paid for anything other than services actually rendered.

Enforcement of RESPA was delegated to the Department of Housing and Urban Development ["HUD"]. In issuing regulations for that purpose, HUD was required to give effect to Congress' intent. Accordingly, the regulations at issue must be construed in that light. HUD provided generally that RESPA applied to "all federally related mortgage loans". 24 C.F.R. § 3500.5(a). However, HUD limited RESPA's broad application via Regulation X, which excludes secondary market transactions from RESPA's coverage, providng, in relevant part:

> (7) Secondary market transactions. A bona fide transfer of a loan obligation in the secondary market is not covered by RESPA and this part, except as set forth in section 6 of RESPA (12 U.S.C. 2605) and Sec. 3500.21. In determining what constitutes a bona fide transfer, HUD will consider the real source of funding and the real interest of the funding lender. Mortgage broker transactions that are table-funded are not secondary market transactions.

25 C.F.R. § 3500.5(b)(7).[5]

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[5] Regulation X defines "table-funded" transactions as a settlement whereby the "loan is funded by a contemporaneous advance of

The Court's determination that the transaction at issue is not covered by RESPA ignores RESPA's plain intent and fails to give effect to Regulation X in its entirety. As noted, Regulation X exempts "bona fide" secondary market transactions from RESPA's coverage, explaining that the determination of whether a secondary market transfer is bona fide includes an examination of the real source of the funds and the real interest of the funding lender. While Summit Mortgage is certainly the source of the initial funding for the Morenos' mortgage, its real interest in the transaction negates any finding that it is the real source of the funds of the mortgage. Additionally, is a sale of a mortgage that is largely consummated before the mortgage is even closed a bona fide transfer in a secondary market? The Morenos respectfully disagree with the court of appeals' conclusion that is.

If Regulation X and "bona fide" are to have any meaning, the Court must acknowledge that First Nationwide, not Summit Mortgage, was the real source of the funding and that only First Nationwide had a "real" interest in owning the loan. Summit Mortgage was a transient lender, differing from the broker in the table-funded transaction addressed in *Culpepper* by nothing

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loan funds and an assignment of the loan to the person advancing the funds". 24 C.F.R. § 3500.2(b). Because table-funded loans are not secondary market transfers, by definition, they fall outside of the above exemption and are thus covered by RESPA. *See Culpepper v. Inland Mortgage Corp.*, 132 F.3d 692 (11th Cir. 1998). In *Culpepper*, the mortgage broker used none of its own money. Instead, the funding of the mortgage went directly from the lender to the seller. *See id.*

more than the timing of when the funds were transferred. Holding Summit Mortgage to be the "real" source of the funds promotes form over substance, and completely undermines the clear intent of RESPA. Similarly, First Nationwide, not Summit Mortgage, had the real interest in the Morenos' mortgage.

First Nationwide's interest is established by the following, all of which occurred before the closing of the mortgage was completed:

1. the Morenos' mortgage was assigned to First Nationwide;

2. First Nationwide, not Summit Mortgage, was listed on the insurance policy relating to the mortgage;

3. tax notices were to be sent to First Nationwide, not Summit Mortgage; and

4. the original note was endorsed in blank.

(App. 17a) By the end of the closing, First Nationwide had the real interest in the mortgage, not Summit Mortgage.

As the record establishes and the court of appeals recognizes in its opinion, Summit Mortgage's funds were transient. It had no interest in holding the loan. In fact, it was prevented from doing so both by its agreement with its warehouse lender and its commitment to sell the

loan to First Nationwide. Summit Mortgage could only access its warehouse funds if it had already agreed to sell the mortgage to another entity such as First Nationwide. Having agreed to sell the mortgage to First Nationwide, Summit Mortgage could not renege without incurring liability. Nevertheless, the court of appeals held it was a bona fide transfer in the secondary market exempted from RESPA by Regulation X. The court of appeals erred and its error gives license to the mortgage industry to inflate mortgages in direct contravention of Congress' intent.

The Fifth Circuit's reliance on Illustration 5 to Regulation X, which demonstrates a truly "bona fide" transfer in the secondary market, is misplaced. The illustration provides:

> 5. *Facts*: A, a "mortgage originator," receives loan applications, funds the loans with its own money or with a wholesale line of credit for which A is liable, and closes the loans in A's own name. Subsequently, B, a mortgage lender, purchases the loans and compensates A for the value of the loans, as well as for any mortgage servicing rights.
>
> *Comments*: Compensation for the sale of a mortgage loan and servicing rights constitutes a secondary market transaction, rather than a referral fee, and is beyond the scope of section 8 of RESPA. For purposes of section 8, in determining whether a *bona fide* transfer of the loan obligation has taken place, HUD examines the real source

> of funding, and the real interest of the named settlement lender.

24 C.F.R. § 3500.5, Appendix B. The critical fact that distinguishes Illustration 5 from the Morenos' transaction is the absence of a pre-arranged sale of the subject mortgage. In the illustration, the loan is closed in the originator's name and "subsequently" is purchased by the lender. The Moreno's loan was assigned to First Nationwide at the closing. There was no "subsequent" sale. The pre-arranged sale at issue here demonstrates the lack of any "real" interest by Summit Mortgage in the loan, undermines the conclusion that Summit Mortgage was the "real" source of the funds, and establishes that it was not a bona fide transfer exempt from RESPA.

The Fifth Circuit's reliance on Regulation X's definitional exclusion of table-funded transactions from RESPA is similarly misplaced. In fact, HUD's recognition that such transactions are not secondary-market transactions at all, and that they are covered by RESPA, actually supports the Morenos' position. The transaction at issue is far more similar to a table-funded transaction than a "bona fide" secondary market transaction. The only difference between the instant transaction and a table-funded transaction is the time at which the money passes hands. All of the other aspects of the transaction were completed at the time of the closing. First Nationwide's money was committed, it was just held back for three weeks. In contrast, a bona fide secondary market transaction involves real risk to the original lender.

Finally, the Fifth Circuit's reliance on the fact that First Nationwide could have reneged on its commitment to purchase the loan ignores the reality of the transaction. The record before the Court demonstrates no possible motivation by First Nationwide to renege on its agreement to purchase the loan for the agreed upon price. As admitted by all, and established in the record, the Morenos' loan was very desireable to First Nationwide. It was the highest rate offered by First Nationwide. As a result, First Nationwide was willing to pay a premium just to obtain the loan.[6] The reality of the situation is that First Nationwide would not have reneged. There was no risk to Summit Mortgage in this transaction, beyond the Morenos discovering that it had sold them an inflated mortgage and was receiving a kickback from First Nationwide for having done so.

## CONCLUSION

This case presents this Court with the ideal scenario in which to decide an important issue of law affecting millions of consumers throughout this nation – whether transactions leading to consumers paying inflated prices for their mortgages will continue to be shielded from RESPA's simple requirement that all such fees be earned. The factual record in this case, as disclosed in the lower courts' opinions, is detailed. Resolution of the issue here will resolve it in all cases involving pre-arranged sales of mortgages. The legal

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[6] Whether the premium paid by First Nationwide for the Morenos' mortgage violates RESPA's prohibition on unearned fees that artificially inflate mortgages is an issue that the United States District Court specifically declined to address due to its conclusion that RESPA did not apply to the transaction.

issue is well-defined and straightforward. This Court should take this opportunity to affirm that Congress meant what it stated in 1974 in passing RESPA - that the mortgage industry could no longer inflate mortgages through referral fees and other transactions involving compensation that are not related to a service actually provided to the consumer.

If the court of appeals' opinion remains uncorrected, the mortgage industry is left with a blueprint for constructing sham transactions stamped with judicial approval. The transaction at issue is not "bona fide". It is not the type of transaction intended to be exempted by Regulation X. Nothing in the regulation or statute supports the court of appeals' conclusion to the contrary. This Court should act here to stop such practices.

In refusing to join his brethren in approving a similar transaction in *Chandler*, Justice Gibson explained his position succinctly:

> A bona fide secondary market transaction is one where a mortgage lender makes loans for its own portfolio and finances these loans from its own or borrowed funds and holds the loans for varying periods of time, or until maturity, with the option of selling its loans, usually in batches on the open market, and not in a preordained procedure where a party makes a loan knowing it will be transferred in due course in a matter of days to the ultimate lender. It appears to me that the

> transaction involved in this case is a pure circumvention of the Congressional legislation relating to federally related mortgage financing and marketing.
>
> Based on the structure of the overall transaction, I believe that the "real source of funding" for the Chandlers' loan was Equicon, acting on behalf of Norwest. In my view, the Chandlers presented a genuine issue of material fact as to whether Norwest gave and Custom accepted a fee based on Custom's servicing of the Chandlers' loan in violation of RESPA. (citation omitted) After viewing the facts in the light most favorable to the Chandlers, (citation omitted), the facts show that Custom and Norwest engaged in a sham transaction which was purposely designed to avoid coverage under RESPA. I do not believe Congress authorized this type of transaction; nor do I believe that this type of transaction is deserving of our judicial stamp of approval. Therefore, I would reverse the district court's summary judgement in favor of Norwest. Accordingly, I would also reverse the district court's imposition of Rule 11 sanctions on the Chandlers' attorney.

Id., 137 F.3d at 1058 (Gibson, J., dissenting).

Although reliance on a sole dissenting voice in seeking this Court's intervention might be considered

foolish, the clear logic and common sense approach of Justice Gibson. Justice Gibson refused to place his judicial stamp of approval on a transaction that was clearly constructed for the purpose of circumventing the clear intent of Congress in passing RESPA. This Court should prevent the Fifth Circuit from doing the same, especially given the facts presented in its opinion, which provide a clear blueprint for avoiding RESPA and artificially inflating mortgages in undeniable contravention of Congress' intent and to the detriment of American consumers.

Respectfully submitted,

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(Any footnotes trail the end of each document)

No. 03-50134

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

VICTOR H. MORENO, III, Individually and On Behalf of Others Similarly Situated; ANA LAURA MORENO, Individually and On Behalf of Others Similarly Situated,
Plaintiffs-Appellants,

versus

SUMMIT MORTGAGE CORPORATION; FIRST NATIONWIDE MORTGAGE CORPORATION,
Defendants-Appellees.

March 23, 2004, Filed

COUNSEL: For VICTOR H MORENO, III, Individually and On Behalf of Others Similarly Sitauted, ANA LAURA MORENO, Individually and On Behalf of Others Similarly Situated, Plaintiffs - Appellants: Ryan Grant Anderson, Ball & Weed, San Antonio, TX. Jason J Thompson, Thompson & Thompson, San Antonio, TX.

For SUMMIT MORTGAGE CORP, Defendant - Appellee: Russell D Weaver, Addison, TX.

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For MORTGAGE BANKERS ASSOCIATION OF AMERICA, Amicus Curiae: C Jay Thomson, Morrison & Foerster, San Francisco, CA.

JUDGES: Before DUHE, BARKSDALE, and DENNIS, Circuit Judges.

OPINIONBY: RHESA HAWKINS BARKSDALE

OPINION: RHESA HAWKINS BARKSDALE, Circuit Judge:

Victor and Ana Moreno appeal the summary judgment granted Summit Mortgage Corporation and First Nationwide Mortgage Corporation. Summit originated a mortgage loan to the Morenos and sold it to First Nationwide. At issue is whether the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 et seq. (RESPA), governs that sale. Because it was a bona fide secondary market transaction, the sale was not covered by RESPA. AFFIRMED.

I.

A summary judgment's being at issue, the record is viewed in the light most favorable to the Morenos -- the nonmovants. Summit originated residential mortgage loans. In so doing, it accepted applications from potential borrowers, evaluated them and their security for the loans, produced documentation to evidence and perfect the loans, and provided funds for the loans if approved. Summit did not retain ownership of the loans it originated. Instead, it sold them to an investor, here

First Nationwide. Summit arranged the sales prior to closing the mortgage loans.

Summit and First Nationwide entered into an agreement which governed the potential sale of mortgage loans from Summit to First Nationwide. Under it, if Summit wanted to sell a prospective loan to First Nationwide, it first submitted a request to First Nationwide to commit to purchase the loan. If Summit and First Nationwide agreed on a purchase price, First Nationwide issued a commitment confirmation. Prior to issuance of the commitment, Summit was not obligated to sell, or even offer, its mortgage loans to First Nationwide. Once the commitment issued, however, Summit had to use its best efforts to close the loan and had to tender it for purchase by First Nationwide. Even then, First Nationwide was not required to purchase the loan; it could reject it for failure to meet the requirements set forth in its "Lender Guide". After a mortgage loan closed, Summit delivered the loan file to First Nationwide for it to make its purchase decision.

For the loans it originated, Summit borrowed the money to fund them from its warehouse lender, Bank United, pursuant to an agreement. Under it, Bank United agreed to fund "Eligible Mortgage Loans". Only prospective loans with a purchase commitment from a third party (e.g., a commitment confirmation from First Nationwide) were "eligible" loans. Restated, Bank United would fund only those loans already committed for purchase by a third party from Summit.

In early 2001, the Morenos applied to Summit for a federally insured mortgage loan of $ 63,500, with an eight percent interest rate, for the purchase of a home

in Texas. In turn, Summit submitted a purchase request to First Nationwide for the Morenos' loan; and on 14 March, First Nationwide executed a commitment confirmation to purchase the mortgage loan if it closed. Upon receipt of the commitment, Summit requested funds from Bank United to fund the loan. On 19 March, Summit delivered a copy of First Nationwide's commitment confirmation to Bank United. Around this same time, Bank United delivered to Summit the funds needed for the mortgage loan. Upon receipt of the funds from Bank United, Summit was obligated to repay the amount of the mortgage loan ($ 63,500) with interest (total of $ 64,452).

On either 19 or 20 March 2001 (the exact date is not relevant), the Morenos and Summit closed the mortgage loan. At closing, the Morenos signed a promissory note with Summit as the payor and a deed with Summit as the beneficiary; they also signed a letter instructing them to send all tax notices received to First Nationwide.

On 19 March, Summit assigned the loan to First Nationwide. And, on 10 April 2001, to pay for its purchase of the mortgage loan, First Nationwide wired funds to Summit. By letter that same day, First Nationwide advised the Morenos of its purchase and that it would be servicing their loan.

The Morenos filed this action in Texas state court, claiming, inter alia, Summit and First Nationwide violated Section 8 of RESPA, 12 U.S.C. § 2607; this is based on the allegation that First Nationwide paid Summit a "yield spread premium" as a referral fee to acquire the Morenos' mortgage loan. The action was

removed to federal court, and all but the RESPA claim was eliminated by the Morenos. Summary judgment was granted against them because Summit's sale of the loan to First Nationwide was a "bona fide secondary market transaction" not governed by RESPA.

II.

A summary judgment is reviewed de novo, applying the same standard as the district court. Gowesky v. Singing River Hosp. Systems, 321 F.3d 503, 507 (5th Cir. 2003). As noted, the record is viewed in the light most favorable to the nonmovant; accordingly, doubts are to be resolved and reasonable inferences drawn in favor of the nonmovant. Id. Summary judgment is appropriate if there is no material fact issue and the movant is entitled to judgment as a matter of law. Id.; FED. R. CIV. P. 56(c).

RESPA was enacted to protect consumers from unnecessarily high settlement charges and abusive mortgage practices. 12 U.S.C. § 2601. Section 8 of RESPA prohibits kickback and referral fee arrangements whereby any payment is made, or "thing of value" is furnished, for the referral of real estate services. 12 U.S.C. § 2607(a). Section 8 does not proscribe, however, "the payment to any person of a bona fide salary or compensation or other payment for ... services actually performed". 12 U.S.C. § 2607(c)(2).

The Department of Housing and Urban Development (HUD), which administers RESPA, has promulgated regulations for doing so, including 24 C.F.R. § 3500.1 et seq., commonly known as Regulation X. That regulation provides: "A bona fide transfer of a loan

obligation in the secondary market is not covered by RESPA". 24 C.F.R. § 3500.5(b)(7). In determining what constitutes a bona fide transfer, HUD considers the "real source of funding and the real interest of the funding lender". Id. In contrast, a "table-funded" transaction is a closing "at which a loan is funded by a contemporaneous advance of loan funds and an assignment of the loan to the person advancing the funds" and is covered by RESPA. 24 C.F.R. § 3500.2(b). "A table-funded transaction is not a secondary market transaction". Id.

The Morenos contend the transaction is not a bona fide secondary market transaction because: prior to their loan's closing, Summit and First Nationwide were committed to First Nationwide's purchasing the Morenos' loan from Summit; "bona fide" is defined in the dictionary as "open and honest", whereas the sale to First Nationwide was deceitful because the Morenos were not informed of it; and Summit's financing of the loan was only interim and therefore it was not the real source of funds.

This issue was addressed by a divided panel in Chandler v. Northwest Bank Minn., Nat'l Ass'n., 137 F.3d 1053 (8th Cir. 1998). There, plaintiffs executed a mortgage loan with Custom Mortgage; it obtained the money to fund the loan through a warehouse lender. Id. at 1054-55. Prior to closing, plaintiffs signed papers informing them that the right to payment under the loan was being assigned. Id. at 1054. Five days after closing, a third party, Equicon, purchased the loan from Custom in accordance with a pre-existing agreement. Id. The Eighth Circuit held that Custom Mortgage was the real source of funding because the loan was not

table funded and Custom closed the loan in its own name. Id. at 1056-57. Although that court did not explicitly hold the mortgage sale was a bona fide secondary market transaction under Regulation X, this is implied by its holding RESPA did not apply because Custom was the real source of funding.

We agree with the reasoning of the Eighth Circuit. The sale of the Morenos' mortgage loan by Summit to First Nationwide was a bona fide secondary market transaction under Regulation X. Summit borrowed the money to fund the Morenos' mortgage loan through its established line of credit with Bank United, not First Nationwide; and Summit closed the loan in its name. Summit was the only party responsible for repaying Bank United and was therefore the real source of funds for the mortgage loan. Moreover, the agreement between Summit and First Nationwide for the latter's purchase of the mortgage loan -- even if it occurred before closing -- has no bearing on Summit's status as the real source of funds and having the real interest in the transaction, consistent with Regulation X. First Nationwide was not obligated to Bank United to pay the money borrowed by Summit; instead it was obligated to pay Summit the purchase price of the loan, as agreed upon between First Nationwide and Summit.

This is reflected by an example in the Appendix to Regulation X; the Appendix provides illustrations of RESPA's requirements for "additional guidance on [its] meaning and coverage". 24 C.F.R. § 3500, App. B. Of course, "courts are required to 'give substantial deference to an agency's interpretation of its own regulations'". Girling Health Care, Inc. v. Shalala, 85 F.3d 211, 215 (5th Cir. 1996) (quoting Thomas Jefferson

University v. Shalala, 512 U.S. 504, 512, 129 L. Ed. 2d 405, 114 S. Ct. 2381 (1994)).

The facts for illustration 5 are:A, a "mortgage originator," receives loan applications, funds the loan with its own money or with a wholesale line of credit for which A is liable, and closes the loans in A's own name. Subsequently, B, a mortgage lender, purchases the loans and compensates A for the value of the loans, as well as for any mortgage servicing rights.24 C.F.R. § 3500, App. B, Ill. 5. (emphasis added). The comments to this illustration confirm that "compensation for the sale of a mortgage loan and servicing rights constitutes a secondary market transaction ... and is beyond the scope of Section 8 of RESPA". Id.

The factual scenario at issue comports with this illustration: Summit is the "mortgage originator" that funded the Morenos' loan through its wholesale line of credit; First Nationwide is the "mortgage lender" that purchased the loan from Summit. The sale by Summit to First Nationwide is not governed by RESPA.

III.

For the foregoing reasons, the judgment is

AFFIRMED.

CIVIL NO. SA-02-CA-0035-CMG

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

VICTOR H. MORENO, III and ANA LAURA MORENO, individually and on behalf of all others similarly situated,
Plaintiffs,

v.

SUMMIT MORTGAGE CORP. and FIRST NATIONWIDE MORTGAGE CORP.,
Defendants.

November 18, 2002

MEMORANDUM AND RECOMMENDATION

Before the Court are defendants', Summit Mortgage Corp. (Summit Mortgage) and First Nationwide Mortgage Corp. (First Nationwide), motions for summary judgment.(Docket nos. 55, 53, 54, 63). Plaintiffs have responded. (Docket nos. 61, 66). Upon consideration, the Court concludes Summit Mortgage's motion for summary judgment should be GRANTED, and First Nationwide's motion for summary judgment should be GRANTED.

Procedural Background

On February 2, 2001, plaintiffs in this case, the Morenos, applied to Summit Mortgage for a federally-

insured mortgage (FHA mortgage) to purchase a home. Surnmit Mortgage approved the loan, with an interest rate of 8%, and closing of the loan took place on either March 19, 2001, or March 20, 2001[1]. Summit Mortgage sold the loan to First Nationwide. Following the closing, the Morenos brought this suit complaining Summit Mortgage and First Nationwide violated Section 8 of the Real Estate Settlement Practices Act (RESPA) , 12 U.S.C. § 2607, because First Nationwide paid Summit mortgage a "yield spread premium" as a referral fee to acquire the Moreno's mortgage loan prior to its closing. First Nationwide and Summit Mortgage moved for summary judgment. On April 24, 2002, this Court granted the Morenos, motion for continuance of a ruling on the defendants, motions for summary judgment pending further discovery. Discovery has now been completed, and the defendants reurge their motions for summary judgment.

Standard of Review

Federal Rule of Civil Procedure 56(b) provides that a defending party may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor. Summary judgment shall be rendered if the pleadings and evidence show there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. FED. R. Civ. P. 56(c). A party seeking summary judgment bears the initial 'burden of informing the court of the basis for its motion, and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The party opposing a motion must present affirmative evidence to defeat a properly

supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986). An adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or otherwise, must set forth specific facts showing there is a genuine issue for trial; if he does not so respond, summary judgment, if appropriate, shall be entered against him. FED. R. Civ. P. 56(e).

The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. Anderson, 477 U.S. at 247-248. The dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Id. All of the evidence and inferences drawn from that evidence must be viewed in the light most favorable to the party opposing the motion for summary judgment. Hibernia Nat'l Bank v. Carner, 997 F.2d 94, 97 (5th Cir. 1993).

Discussion

First Nationwide and Summit Mortgage assert individual motions for summary judgment, and the Morenos have submitted a combined response. All parties agree the central issue in this motion is whether, as a matter of law, the sale of the Morenos' loan by Summit Mortgage to First Nationwide qualifies as a bona fide secondary market transaction, thereby removing this transaction from the restrictions of Section 8 of RESPA. Because this issue is central to both motions for summary judgment, and the evidence presented by Summit Mortgage and First Nationwide

is similar and related to this determination, this Court will address both motions together.

The Morenos' suit rests upon alleged violations of RESPA by Summit Mortgage and First Nationwide. Consequently, the Morenos must first establish that this mortgage loan transaction falls within the protections of RESPA. In their complaint, the Morenos, contend First Nationwide was the actual lender and true source of the movies used to fund their mortgage because Summit Mortgage assigned their mortgage to First Nationwide prior to closing in accordance with a preexisting agreement between these two parties. The Morenos allege preassignment. of their mortgage loan is evidence of "table funding", and any table-funded loan falls within the coverage of Section 8 of RESPA. Once under RESPA's protection, the Morenos contend First Nationwide and Summit Mortgage violated RESPA because First Nationwide paid Summit Mortgage a prohibited "yield spread premium"[2] to acquire their above-par rate mortgage loan.

Suimit Mortgage and First Nationwide contend Summit Mortgage sold the Morenos' mortgage loan to First Nationwide for a fee (contingent upon the interest rate) after the loan had already been closed, and therefore, the sale was a "bona fide. secondary market" transaction. As a bona fide secondary market transaction, Summit Mortgage and First Nationwide contend it is exempt from RESPA, and therefore, the Morenos' cause of action must fail as a matter of law. Accordingly, in this motion for summary judgment, the specific issue to be determined is whether the transfer of the Morenos' loan from Summit Mortgage to First

Nationwide amounted to a good faith secondary market transaction or a case of "tablefunding."

The essential difference between the two types of transactions is that in a secondary market transaction, a mortgage lender, or broker, makes a loan in its own name financed from its own funds or its own borrowed funds. The lender has the option to keep the loan in its own portfolio or sell it to another party following the closing. If a loan is table-funded, on the other hand, the loan is funded at closing by a third party through a transfer of funds to the original lender and a contemporaneous assignment of the loan is percentage of the total amount of the loan, with the exact percentage made from the original lender to the third party. The significant legal difference between these two transactions is secondary market transactions do not fall within RESPA's prohibition of kickback or referral fees, so any money received by the original lender from the third party cannot be scrutinized under these restrictions, regardless of its form. However, in the case of loans that are table-funded, payments by the third party to the original lender, typically in the form of a yield spread premium, may be deemed to be unlawful kickbacks or referral fees under Section 8 of RESPA. [3]

Congress enacted RESPA to protect home buyers from inflated prices of services and hidden fees caused by certain abusive practices in the home-buying process. 12 U.S.C. § 2601(a). To do so, RESPA prohibits providers of any federally-insured home mortgage loan from paying a referral fee, kickback, or "thing of value" for acquisition of a mortgage loan. Id. at § 2607 (a) However, Section 2607 (c) exempts from this

prohibition any "payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed." Id. at § 2607 (c) (2). HUD, the administrative agency charged with enforcing RESPA, is authorized to prescribe rules and regulations and to make interpretations of RESPA. Pursuant to this authority, HUD has issued 24 C.F.R. § 3500.1 et seq., called Regulation X.

Under Regulation X, HUD explains that in its determination of what constitutes a bona fide transfer exempted from Section 8 of RESPA, it will "consider the real source of funding and the real interest of the funding lender." 24 C.F.R. § 3500.5(b)(7); see also Chandler v. Norwest Bank Minn., Nat'l Ass'n, 137 F. 3d 1053, 1056 (8th Cir. 1998). Consequently, in this motion for summary judgment, the Morenos must raise a genuine issue of material fact regarding whether First Nationwide was the true source of the funding of their mortgage or whether Summit Mortgage's real interest was that of a mortgage broker, not as one who originates loans. See Chandler, 137 F.3d at 1056.

To show this transaction was a bona fide secondary market transaction, First Nationwide and Summit Mortgage present summary judgment evidence showing Summit Mortgage's business is to originate residential mortgage loans. Summit Mortgage's motion for summary Judgment, Affidavit of Stuart Porter,, Par. 3. In so doing, Summit accepts mortgage applications from potential borrowers, performs or arranges for all work necessary to evaluate and approve the applicants and the security for the loan, and, for approved applications, produces the necessary

documentation to properly evidence and perfect the mortgage loan and provides the funds for the loan. Id. Summit Mortgage maintains an agreement with Bank United, a warehouse lender, to fund all loans assigned for purchase by these mortgage lenders following closing. Id. at Par. 5; Plaintiffs' response, Exh. 2. Summit Mortgage originated the Morenos' mortgage loan, obtained the capital necessary to fund the Morenos' loan through its pre-existing line of credit with Bank United, and closed the loan in its own name. Summit Mortgage's motion for summary Judgment, Affidavit of Stuart Porter, Par. 4 and 5, and Exhs. D,E,F. Summit Mortgage executed an assignment of the Morenos' mortgage loan to First Nationwide on March 19, 2001. Plaintiffs' response, Exh. 11. First Nationwide purchased the Morenos' mortgage from Summit Mortgage approximately three weeks after the closing. Plaintiffs, response, Exh. 16.

To raise a genuine issue of material fact regarding whether First Nationwide was the true source of the funds for their mortgage, the Morenos present summary judgment evidence consisting of the pre-existing agreement between First Nationwide and summit Mortgage titled, "Mortgage Loan Purchase and Sale Agreement", a contract between Summit Mortgage and Bank United titled, "Warehouse Credit and Security Agreement", and First Nationwide's "Lender Guide". Under the "Mortgage Loan Purchase and Sale Agreement", Summit Mortgage agreed to sell mortgages to First Nationwide that complied with the restrictions outlined in the Lender's Guide. Plaintiffs' response, Exh. 1, Sect. 3.04(c). Under this contract, Summit Mortgage would submit a request to First Nationwide to commit to buy a prospective loan. Id. at

Art. III. Once the price was agreed upon, First Nationwide would execute a "Commitment Confirmation" which bound First Nationwide to buy a specific prospective loan after it was closed by Summit Mortgage. Id.

Under the "Warehouse Credit and Security Agreement", Bank United agreed to fund the closing of "Eligible Mortgage Loans". Plaintiffs' response, Exh. 2, pp. 5, 14. Only prospective mortgage loans with an executed purchase commitment, or "Commitment Confirmation" from third parties, like First Nationwide, are eligible mortgage loans" under the warehousing contract between Summit Mortgage and Bank United. Id. at Exh. 2, p. 5. With these interim funds received through Bank United, Summit Mortgage would fund and close a mortgage loan. Summit mortgage would then sell the mortgage loan to the committed third party mortgage lender, and repay Bank United. Bank United would then deliver the mortgage loan to the purchasing mortgage lender.

Pursuant to First Nationwide's Lender's Guide, each mortgage submitted to First Nationwide for purchase must meet specific underwriting criteria. Plaintiffs, response, Exh. 3, Underwriting Criteria. Also pursuant to the Lender's Guide, First Nationwide issued daily price sheets detailing what it would pay for specific loans. Plain tiffs, response, Exh. 4; Exh 5. The amount paid was primarily tied to the amount the interest rate of the prospective mortgage loan exceeded First Nationwide's listed par rate. Id.

On March 14, 2001, First Nationwide executed and delivered to Summit Mortgage a Commitment

confirmation identifying the Morenos' mortgage. Plaintiffs' response, Exh. 6. On March 14, 2001, when First Nationwide committed to purchase the Morenos' mortgage from summit Mortgage, a loan with an interest rate of 8% was the highest priced loan. Id. at Exh. 4. Upon receipt of First Nationwide's Commitment Confirmation, Summit Mortgage requested interim funds from Bank United to fund the Morenos' mortgage. Id. at Exh. 7.

On March 19, 2001, Summit Mortgage delivered to Bank United a copy of First Nationwide's purchase commitment, indicating First Nationwide was going to pay for the Morenos's loan once closed, and was purchasing it for an amount above the interim financing cost. Plaintiffs' response, Exb. 8. On March 19, 2001, Summit Mortgage executed an assignment of the Morenos' loan to First Nationwide. Id. at Exh. 11. On March 19, 2001, summit Mortgage executed an Insurance Endorsement Letter, requesting the mortgagee on the insurance policy covering the residence be changed to First Nationwide. Id. at 13.

At closing, the Morenos signed a notice informing them to send all tax notices received to First Nationwide. Plaintiffs, response, Exh. 14. Following the closing, Summit Mortgage delivered to Bank United the original note, endorsed in blank, a certified copy of the mortgage, a recordable assignment of the mortgage, a copy of the check used to fund the Morenos' loan, and a copy of First Nationwide' s purchase commitment. Id. at Exh. 8. First Nationwide later transferred the funds for the purchase of the Morenos' mortgage loan to Summit Mortgage on April 10, 2001. Id. at 16.

The Morenos contend these contracts and documents show Summit mortgage assigned the Morenos' loan to First Nationwide on March 19, 2001, prior to its closing, and therefore, First Nationwide was the actual holder of the mortgage loan at closing. Summit Mortgage then used the pre-closing funding scheme to obtain interim financing from Bank United, while the actual loan documents were sent to First Nationwide. Because suit Mortgage assigned their mortgage to First Nationwide prior to its closing, the Morenos contend Summit Mortgage never held legal or equitable title of their executed mortgage and received an illegal "kickback" from First Nationwide for the Morenos' above par-rate mortgage. The Morenos assert that, because Summit Mortgage and First Nationwide were contractually obligated to transfer their loan prior to its inception, they cannot argue it was sold "on the secondary market." The Morenos contend these before-closing agreements are sufficient to raise a genuine issue of material fact whether First Nationwide was the true source of funding and whether Summit Mortgage's real interest was that of a mortgage broker, not a mortgage lender.

This court concludes the summary judgment evidence presented does not raise a genuine issue of material fact sufficient to avoid summary judgment in this case. The summary judgment evidence presented shows positively that Summit Mortgage originated the Morenos' loan, funded it with its own funds received through an independent line of credit from a warehouse lender, and closed the loan in its own name. This is sufficient to establish that the sale of the loan to First Nationwide was a "bona fide secondary market

transaction" which avoids the restrictions of Section 8 of RESPA. See Chandler, 137 F.3d at 1056-1057.

Although Summit Mortgage concedes it is a loan originator with no intentions of holding and servicing mortgage - loans it originates, this does not place its transactions within the restrictions of Section 8 of RESPA. Although Summit Mortgage may have executed an assignment of the Morenos' loan to First Nationwide prior to its closing, and obtained a warehouse loan based upon this assignment, this does not imply or even raise a genuine issue of material fact whether First Nationwide was the true source of the monies used to fund the Morenos' loan. The summary judgment evidence shows Summit Mortgage did not receive funds from First Nationwide until April 10, 2001. Consequently, the Morenos fail to raise a genuine issue of material fact regarding the true source of the funding for its loan.

Although the Morenos were not advised at the loan closing of the assignment of their loan to First Nationwide or that Summit Mortgage was receiving a fee for this assignment, this does not violate RESPA, nor does it place this transaction within RESPA. Even the "Mortgage Loan purchase and Sale Agreement" between Summit Mortgage and First Nationwide, which the Morenos attempt to use to show First Nationwide held actual title to their loan prior to closing, states First Nationwide will only purchase loans already closed by Summit Mortgage. Plaintiffs' response, Exh. 1, Sect. 3.04(c). Although Summit Mortgage seeks an advance commitment from First Nationwide for the purchase of prospective loans, and executes papers of assignment prior to the actual

closing, this does not transfer actual title in the prospective loans to First Nationwide, nor does it make First Nationwide the actual source of the monies used to fund the loan.

In making this determination, this court is persuaded by the reasoning of the Eighth Circuit in Chandler, the only court to address this specific issue. In Chandler, the plaintiffs advanced a similar argument as the Morenos, contending a similar preexisting "purchase and Sale Agreement" between the originator of the mortgage loan and the eventual purchaser constituted sufficient proof that this purchaser held legal title at the loan closing and was the true source of the funds. Chandler, 137 F.3d at 1056-1057. The Eight Circuit discounted this argument, stating such an agreement, though pre-existing, was irrelevant to the issue of the true source of the movies funding the mortgage loan. Id.

Similar to the facts of this case, the originating lender in Chandler closed the loan in its own name with funds borrowed from a warehouse lender under an established line of credit, subsequently received a wire transfer of funds from the purchasing lender, transferred the mortgage loan, and used the funds received from the purchaser to repay its warehouse lender. Id. at 1054-1057. In addition, as in this case, the Chandler Court held that the plaintiffs failed to produce any evidence that the funds disbursed at the loan closing came from any source other than the originating lender. Id. at 1056. The Chandler court held these facts confirmed the transaction to be a bona fide secondary market transaction, not a "table funded" transaction,

thus placing it outside the restrictions of section 8 of RESPA. Id. at 1056-1057.

As in Chandler, the Morenos have failed to provide any summary judgment evidence which raises a genuine issue of material fact whether the funds dispersed at the closing of their mortgage loan came from any source other than Summit Mortgage. Because this is the determinative factor in the issue whether the sale of a mortgage is a bona fide secondary market transaction, the Morenos have failed to present evidence sufficient to avoid summary judgment in favor of First Nationwide and Summit Mortgage. Therefore, First Nationwide's and Summit Mortgage's motions for summary judgement should be GRANTED.

## RECOMMENDATION

It is the recommendation of the Magistrate Judge that Summit Mortgage Corp.'s motion for summary judgment be GRANTED and First Nationwide Mortgage Corp.'s motion for summary judgment be GRANTED.

### Instructions for service and Notice of Right to Appeal/Obiect

The United States District Clerk shall serve a copy of this Memorandum and Recommendation on all parties either (1) by certified mail, return receipt requested, or (2) by facsimile if authorization to do so is on file with the Clerk. Pursuant to Title 28 U.S.C. Section 636(b)(1) and Rule 72(b) , Fed. R. Civ. P. , any party who desires to object to this report must serve and file written objections to the Memorandum and Recommendation within 10 days after being served with a copy unless this time period is modified by the district court. A party. filing objections must specifically identify those findings, conclusions or recommendations to which objections are being made and the basis for such objections; the district court need not consider frivolous, conclusive or general objections. Such party shall file the objections with the clerk of the court, and serve the objections on all other parties and the magistrate judge. A party's failure to file written objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a de novo determination by the district court. See Thomas v. Arn, 474 U.S. 140, 150 (1985). Additionally, any failure to file written objections to the proposed findings, conclusions and recorrmendation

contained in this Memorandum and Recommendation within 10 days after being served with a copy shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. Douglass v. United Servs. Auto. Ass 'n,79 F.3d 1415, 1428 (5th Cir. 1996). SIGNED this 15th day of November 2002.

JOHN W. PRIMOMO
United States Magistrate Judge

FOOTNOTES

[1] The parties dispute the exact date of the loan closing; however, exact determination is inconsequential to the relevant issue of this motion for summary judgment.

[2] A "yield spread premium" (YSP) is a payment made by a mortgage lender (in this case, First Nationwide) to a mortgage broker or originator (in this case, summit Mortgage) in exchange for transfer of a mortgage with an interest rate above the "par rate" offered by the lender. The payment is typically a determined by the extent to which the loan's interest rate exceeds the par rate. A YSP potentially violates Section 8 of RESPA, which prohibits the payment of kickback fees and referral fees in association with mortgage lending. See Schuetz v. Banc One Mortgage Corp., 292 F.3d 1004, 1007,1011-1014 (9th Cir. 2002); Levine v. X. Am. Mortgage, 188 F.R.D. 320, 325-328 (D. Minn. 1999).

[3] The secondary issue in this particular case, though not an issue of this motion for summary judgment, is whether the "yield spread premium, paid by First

Nationwide to summit Mortgage for the acquisition of the Morenos' mortgage loan is prohibited under RESPA. However, the primary issue regarding whether this transaction is governed by RESPA is the sole subject of this motion for summary judgment, and must be decided first.

CIVIL NO. SA-02-CA-0035-CMG

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

VICTOR H. MORENO# III and ANA LAURA MORENO, individually and on behalf of all others similarly situated,
Plaintiffs,

v.

SUMMIT MORTGAGE CORP. and FIRST NATIONWIDE MORTGAGE CORP.,
Defendants.

January 3, 2003

ORDER

Before the Court are the memorandum and recommendation of United States Magistrate Judge John W. Primomo (Dkt. # 77), and Plaintiffs' objections thereto (Dkt. #79). The Court has conducted an independent review of the record, a de navy review of the matters raised by the objections, and has reviewed the applicable law. See 28 U.S.C. § 636(b)(1); FED. R. Civ. P. 72(b). The Court concludes that Plaintiffs' objections lack merit, and they are OVERRULED. The memorandum and recommendation is ACCEPTED in its entirety. It is further ORDERED that Summit Mortgage Corporation's Motion for Summary Judgment (Dkt. #53) and First Nationwide Mortgage Corporation's Motion for Summary Judgment (Dkt.

#15) are hereby GRANTED. SIGNED and ENTERED on the 3rd day of January, 2003.

ORLANDO L. GARCIA
UNITED STATES DISTRICT JUDGE

## RELEVANT PROVISIONS

### § 2601. Congressional findings and purpose

(a) The Congress finds that significant reforms in the real estate settlement process are needed to insure that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country. The Congress also finds that it has been over two years since the Secretary of Housing and Urban Development and the Administrator of Veterans' Affairs submitted their joint report to the Congress on "Mortgage Settlement Costs" and that the time has come for the recommendations for Federal legislative action made in that report to be implemented.

(b) It is the purpose of this chapter to effect certain changes in the settlement process for residential real estate that will result--

(1) in more effective advance disclosure to home buyers and sellers of settlement costs;

(2) in the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services;

(3) in a reduction in the amounts home buyers are required to place in escrow accounts established to insure the payment of real estate taxes and insurance; and

(4) in significant reform and modernization of local recordkeeping of land title information.

12 U.S.C. 2601.

**§ 2607. Prohibition against kickbacks and unearned fees**

(a) Business referrals

No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

(b) Splitting charges

No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

(c) Fees, salaries, compensation, or other payments

Nothing in this section shall be construed as prohibiting (1) the payment of a fee (A) to attorneys at law for services actually rendered or (B) by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance or (C) by a lender to its duly appointed agent for services actually performed in the making of a loan, (2) the payment to

any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed, (3) payments pursuant to cooperative brokerage and referral arrangements or agreements between real estate agents and brokers, (4) affiliated business arrangements so long as (A) a disclosure is made of the existence of such an arrangement to the person being referred and, in connection with such referral, such person is provided a written estimate of the charge or range of charges generally made by the provider to which the person is referred (i) in the case of a face-to-face referral or a referral made in writing or by electronic media, at or before the time of the referral (and compliance with this requirement in such case may be evidenced by a notation in a written, electronic, or similar system of records maintained in the regular course of business); (ii) in the case of a referral made by telephone, [FN1] within 3 business days after the referral by telephone, (and in such case an abbreviated verbal disclosure of the existence of the arrangement and the fact that a written disclosure will be provided within 3 business days shall be made to the person being referred during the telephone referral); or (iii) in the case of a referral by a lender (including a referral by a lender to an affiliated lender), at the time the estimates required under section 2604(c) of this title are provided (notwithstanding clause (i) or (ii)); and any required written receipt of such disclosure (without regard to the manner of the disclosure under clause (i), (ii), or (iii)) may be obtained at the closing or settlement (except that a person making a face-to-face referral who provides the written disclosure at or before the time of the referral shall attempt to obtain any required written receipt of such disclosure at such time and if the

person being referred chooses not to acknowledge the receipt of the disclosure at that time, that fact shall be noted in the written, electronic, or similar system of records maintained in the regular course of business by the person making the referral), (B) such person is not required to use any particular provider of settlement services, and (C) the only thing of value that is received from the arrangement, other than the payments permitted under this subsection, is a return on the ownership interest or franchise relationship, or (5) such other payments or classes of payments or other transfers as are specified in regulations prescribed by the Secretary, after consultation with the Attorney General, the Secretary of Veterans Affairs, the Federal Home Loan Bank Board, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, and the Secretary of Agriculture. For purposes of the preceding sentence, the following shall not be considered a violation of clause (4)(B): (i) any arrangement that requires a buyer, borrower, or seller to pay for the services of an attorney, credit reporting agency, or real estate appraiser chosen by the lender to represent the lender's interest in a real estate transaction, or (ii) any arrangement where an attorney or law firm represents a client in a real estate transaction and issues or arranges for the issuance of a policy of title insurance in the transaction directly as agent or through a separate corporate title insurance agency that may be established by that attorney or law firm and operated as an adjunct to his or its law practice.

(d) Penalties for violations; joint and several liability; treble damages; actions for injunction by Secretary and by State officials; costs and attorney fees; construction of State laws

(1) Any person or persons who violate the provisions of this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(2) Any person or persons who violate the prohibitions or limitations of this section shall be jointly and severally liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service.

(3) No person or persons shall be liable for a violation of the provisions of subsection (c)(4)(A) of this section if such person or persons proves by a preponderance of the evidence that such violation was not intentional and resulted from a bona fide error notwithstanding maintenance of procedures that are reasonably adapted to avoid such error.

(4) The Secretary, the Attorney General of any State, or the insurance commissioner of any State may bring an action to enjoin violations of this section.

(5) In any private action brought pursuant to this subsection, the court may award to the prevailing party the court costs of the action together with reasonable attorneys fees.

(6) No provision of State law or regulation that imposes more stringent limitations on affiliated business

arrangements shall be construed as being inconsistent with this section.

CODE OF FEDERAL REGULATIONS

TITLE 24--HOUSING AND URBAN DEVELOPMENT

SUBTITLE B--REGULATIONS RELATING TO HOUSING AND URBAN DEVELOPMENT

CHAPTER XX--OFFICE OF ASSISTANT SECRETARY FOR HOUSING--FEDERAL HOUSING COMMISSIONER, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

PART 3500--REAL ESTATE SETTLEMENT PROCEDURES ACT

**§ 3500.5 Coverage of RESPA.**

(a) Applicability. RESPA and this part apply to all federally related mortgage loans, except for the exemptions provided in paragraph (b) of this section.

(b) Exemptions.

(1) A loan on property of 25 acres or more.

(2) Business purpose loans. An extension of credit primarily for a business, commercial, or agricultural purpose, as defined by Regulation Z, 12 CFR 226.3(a)(1). Persons may rely on Regulation Z in determining whether the exemption applies.

(3) Temporary financing. Temporary financing, such as a construction loan. The exemption for temporary financing does not apply to a loan made to finance construction of 1- to 4-family residential property if the loan is used as, or may be converted to, permanent financing by the same lender or is used to finance transfer of title to the first user. If a lender issues a commitment for permanent financing, with or without conditions, the loan is covered by this part. Any construction loan for new or rehabilitated 1- to 4-family residential property, other than a loan to a bona fide builder (a person who regularly constructs 1- to 4-family residential structures for sale or lease), is subject to this part if its term is for two years or more. A "bridge loan" or "swing loan" in which a lender takes a security interest in otherwise covered 1- to 4-family residential property is not covered by RESPA and this part.

(4) Vacant land. Any loan secured by vacant or unimproved property, unless within two years from the date of the settlement of the loan, a structure or a manufactured home will be constructed or placed on the real property using the loan proceeds. If a loan for a structure or manufactured home to be placed on vacant or unimproved property will be secured by a lien on that property, the transaction is covered by this part.

(5) Assumption without lender approval. Any assumption in which the lender does not have the right expressly to approve a subsequent person as the borrower on an existing federally related mortgage loan. Any assumption in which the lender's permission is both required and obtained is covered by RESPA

and this part, whether or not the lender charges a fee for the assumption.

(6) Loan conversions. Any conversion of a federally related mortgage loan to different terms that are consistent with provisions of the original mortgage instrument, as long as a new note is not required, even if the lender charges an additional fee for the conversion.

(7) Secondary market transactions. A bona fide transfer of a loan obligation in the secondary market is not covered by RESPA and this part, except as set forth in section 6 of RESPA (12 U.S.C. 2605) and § 3500.21. In determining what constitutes a bona fide transfer, HUD will consider the real source of funding and the real interest of the funding lender. Mortgage broker transactions that are table-funded are not secondary market transactions. Neither the creation of a dealer loan or dealer consumer credit contract, nor the first assignment of such loan or contract to a lender, is a secondary market transaction (see § 3500.2.)

24 C.F.R. § 3500.5

**§ 3500.2 Definitions.**

(a) Statutory terms. All terms defined in RESPA (12 U.S.C. 2602) are used in accordance with their statutory meaning unless otherwise defined in paragraph (b) of this section or elsewhere in this part.
(b) Other terms. As used in this part:

Application means the submission of a borrower's financial information in anticipation of a credit decision,

whether written or computer-generated, relating to a federally related mortgage loan. If the submission does not state or identify a specific property, the submission is an application for a pre-qualification and not an application for a federally related mortgage loan under this part. The subsequent addition of an identified property to the submission converts the submission to an application for a federally related mortgage loan.

Business day means a day on which the offices of the business entity are open to the public for carrying on substantially all of the entity's business functions.

Dealer means, in the case of property improvement loans, a seller, contractor, or supplier of goods or services. In the case of manufactured home loans, "dealer" means one who engages in the business of manufactured home retail sales.

Dealer loan or dealer consumer credit contract means, generally, any arrangement in which a dealer assists the borrower in obtaining a federally related mortgage loan from the funding lender and then assigns the dealer's legal interests to the funding lender and receives the net proceeds of the loan. The funding lender is the lender for the purposes of the disclosure requirements of this part. If a dealer is a "creditor" as defined under the definition of "federally related mortgage loan" in this part, the dealer is the lender for purposes of this part.

Effective date of transfer is defined in section 6(i)(1) of RESPA (12 U.S.C. 2605(i)(1)). In the case of a home equity conversion mortgage or reverse mortgage as referenced in this section, the effective date of transfer

is the transfer date agreed upon by the transferee servicer and the transferor servicer.

Federally related mortgage loan or mortgage loan means as follows:

(1) Any loan (other than temporary financing, such as a construction loan):

(i) That is secured by a first or subordinate lien on residential real property, including a refinancing of any secured loan on residential real property upon which there is either:

(A) Located or, following settlement, will be constructed using proceeds of the loan, a structure or structures designed principally for occupancy of from one to four families (including individual units of condominiums and cooperatives and including any related interests, such as a share in the cooperative or right to occupancy of the unit); or

(B) Located or, following settlement, will be placed using proceeds of the loan, a manufactured home; and

(ii) For which one of the following paragraphs applies. The loan:

(A) Is made in whole or in part by any lender that is either regulated by or whose deposits or accounts are insured by any agency of the Federal Government;

(B) Is made in whole or in part, or is insured, guaranteed, supplemented, or assisted in any way:

(1) By the Secretary or any other officer or agency of the Federal Government; or

(2) Under or in connection with a housing or urban development program administered by the Secretary or a housing or related program administered by any other officer or agency of the Federal Government;

(C) Is intended to be sold by the originating lender to the Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation (or its successors), or a financial institution from which the loan is to be purchased by the Federal Home Loan Mortgage Corporation (or its successors);

(D) Is made in whole or in part by a "creditor", as defined in section 103(f) of the Consumer Credit Protection Act (15 U.S.C. 1602(f)), that makes or invests in residential real estate loans aggregating more than $1,000,000 per year. For purposes of this definition, the term "creditor" does not include any agency or instrumentality of any State, and the term "residential real estate loan" means any loan secured by residential real property, including single-family and multifamily residential property;

(E) Is originated either by a dealer or, if the obligation is to be assigned to any maker of mortgage loans specified in paragraphs (1)(ii)(A) through (D) of this definition, by a mortgage broker; or

(F) Is the subject of a home equity conversion mortgage, also frequently called a "reverse mortgage,"

issued by any maker of mortgage loans specified in paragraphs (1)(ii)(A) through (D) of this definition.

(2) Any installment sales contract, land contract, or contract for deed on otherwise qualifying residential property is a federally related mortgage loan if the contract is funded in whole or in part by proceeds of a loan made by any maker of mortgage loans specified in paragraphs (1)(ii)(A) through (D) of this definition.

(3) If the residential real property securing a mortgage loan is not located in a State, the loan is not a federally related mortgage loan.

Good faith estimate means an estimate, prepared in accordance with section 5 of RESPA (12 U.S.C. 2604), of charges that a borrower is likely to incur in connection with a settlement.

HUD-1 or HUD-1A settlement statement (also HUD-1 or HUD-1A) means the statement that is prescribed by the Secretary in this part for setting forth settlement charges in connection with either the purchase or the refinancing (or other subordinate lien transaction) of 1- to 4-family residential property.

Lender means, generally, the secured creditor or creditors named in the debt obligation and document creating the lien. For loans originated by a mortgage broker that closes a federally related mortgage loan in its own name in a table funding transaction, the lender is the person to whom the obligation is initially assigned at or after settlement. A lender, in connection with dealer loans, is the lender to whom the loan is assigned, unless the dealer meets the definition of creditor as

defined under "federally related mortgage loan" in this section. See also § 3500.5(b)(7), secondary market transactions.

Managerial employee means an employee of a settlement service provider who does not routinely deal directly with consumers, and who either hires, directs, assigns, promotes, or rewards other employees or independent contractors, or is in a position to formulate, determine, or influence the policies of the employer. Neither the term "managerial employee" nor the term "employee" includes independent contractors, but a managerial employee may hold a real estate brokerage or agency license.

Manufactured home is defined in § 3280.2 of this title.

Mortgage broker means a person (not an employee or exclusive agent of a lender) who brings a borrower and lender together to obtain a federally related mortgage loan, and who renders services as described in the definition of "settlement services" in this section. A loan correspondent approved under § 202.8 of this title for Federal Housing Administration programs is a mortgage broker for purposes of this part.

Mortgaged property means the real property that is security for the federally related mortgage loan.

Person is defined in section 3(5) of RESPA (12 U.S.C. 2602(5)).

Public Guidance Documents means documents that HUD has published in the Federal Register, and that it may amend from time-to-time by publication in the

Federal Register. These documents are also available from HUD at the address indicated in 24 CFR 3500.3.

Refinancing means a transaction in which an existing obligation that was subject to a secured lien on residential real property is satisfied and replaced by a new obligation undertaken by the same borrower and with the same or a new lender. The following shall not be treated as a refinancing, even when the existing obligation is satisfied and replaced by a new obligation with the same lender (this definition of "refinancing" as to transactions with the same lender is similar to Regulation Z, 12 CFR 226.20(a)):

(1) A renewal of a single payment obligation with no change in the original terms;

(2) A reduction in the annual percentage rate as computed under the Truth in Lending Act with a corresponding change in the payment schedule;

(3) An agreement involving a court proceeding;

(4) A workout agreement, in which a change in the payment schedule or change in collateral requirements is agreed to as a result of the consumer's default or delinquency, unless the rate is increased or the new amount financed exceeds the unpaid balance plus earned finance charges and premiums for continuation of allowable insurance; and

(5) The renewal of optional insurance purchased by the consumer that is added to an existing transaction, if disclosures relating to the initial purchase were provided.

Regulation Z means the regulations issued by the Board of Governors of the Federal Reserve System (12 CFR part 226) to implement the Federal Truth in Lending Act (15 U.S.C. 1601 et seq.), and includes the Commentary on Regulation Z.

Required use means a situation in which a person must use a particular provider of a settlement service in order to have access to some distinct service or property, and the person will pay for the settlement service of the particular provider or will pay a charge attributable, in whole or in part, to the settlement service. However, the offering of a package (or combination of settlement services) or the offering of discounts or rebates to consumers for the purchase of multiple settlement services does not constitute a required use. Any package or discount must be optional to the purchaser. The discount must be a true discount below the prices that are otherwise generally available, and must not be made up by higher costs elsewhere in the settlement process.

RESPA means the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. 2601 et seq.

Servicer means the person responsible for the servicing of a mortgage loan (including the person who makes or holds a mortgage loan if such person also services the mortgage loan). The term does not include:

(1) The Federal Deposit Insurance Corporation (FDIC) or the Resolution Trust Corporation (RTC), in connection with assets acquired, assigned, sold, or transferred pursuant to section 13(c) of the Federal

Deposit Insurance Act or as receiver or conservator of an insured depository institution; and

(2) The Federal National Mortgage Corporation (FNMA); the Federal Home Loan Mortgage Corporation (Freddie Mac); the RTC; the FDIC; HUD, including the Government National Mortgage Association (GNMA) and the Federal Housing Administration (FHA) (including cases in which a mortgage insured under the National Housing Act (12 U.S.C. 1701 et seq.) is assigned to HUD); the National Credit Union Administration (NCUA); the Farmers Home Administration or its successor agency under Public Law 103-354 (FmHA); and the Department of Veterans Affairs (VA), in any case in which the assignment, sale, or transfer of the servicing of the mortgage loan is preceded by termination of the contract for servicing the loan for cause, commencement of proceedings for bankruptcy of the servicer, or commencement of proceedings by the FDIC or RTC for conservatorship or receivership of the servicer (or an entity by which the servicer is owned or controlled).

Servicing means receiving any scheduled periodic payments from a borrower pursuant to the terms of any mortgage loan, including amounts for escrow accounts under section 10 of RESPA (12 U.S.C. 2609), and making the payments to the owner of the loan or other third parties of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the mortgage servicing loan documents or servicing contract. In the case of a home equity conversion mortgage or reverse mortgage as referenced in this

section, servicing includes making payments to the borrower.

Settlement means the process of executing legally binding documents regarding a lien on property that is subject to a federally related mortgage loan. This process may also be called "closing" or "escrow" in different jurisdictions.

Settlement service means any service provided in connection with a prospective or actual settlement, including, but not limited to, any one or more of the following:

(1) Origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications, loan processing, and the underwriting and funding of such loans);

(2) Rendering of services by a mortgage broker (including counseling, taking of applications, obtaining verifications and appraisals, and other loan processing and origination services, and communicating with the borrower and lender);

(3) Provision of any services related to the origination, processing or funding of a federally related mortgage loan;

(4) Provision of title services, including title searches, title examinations, abstract preparation, insurability determinations, and the issuance of title commitments and title insurance policies;

(5) Rendering of services by an attorney;

(6) Preparation of documents, including notarization, delivery, and recordation;

(7) Rendering of credit reports and appraisals;

(8) Rendering of inspections, including inspections required by applicable law or any inspections required by the sales contract or mortgage documents prior to transfer of title;

(9) Conducting of settlement by a settlement agent and any related services;

(10) Provision of services involving mortgage insurance;

(11) Provision of services involving hazard, flood, or other casualty insurance or homeowner's warranties;

(12) Provision of services involving mortgage life, disability, or similar insurance designed to pay a mortgage loan upon disability or death of a borrower, but only if such insurance is required by the lender as a condition of the loan;

(13) Provision of services involving real property taxes or any other assessments or charges on the real property;

(14) Rendering of services by a real estate agent or real estate broker; and

(15) Provision of any other services for which a settlement service provider requires a borrower or seller to pay.

Special information booklet means the booklet prepared by the Secretary pursuant to section 5 of RESPA (12 U.S.C. 2604) to help persons understand the nature and costs of settlement services. The Secretary publishes the form of the special information booklet in the Federal Register. The Secretary may issue or approve additional booklets or alternative booklets by publication of a Notice in the Federal Register.

State means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

Table funding means a settlement at which a loan is funded by a contemporaneous advance of loan funds and an assignment of the loan to the person advancing the funds. A table-funded transaction is not a secondary market transaction (see § 3500.5(b)(7)).

Title company means any institution, or its duly authorized agent, that is qualified to issue title insurance.